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CASES CITED.

In the Supreme Court of the United States.

OCTOBER TERM, 1923.

EDWARD AND JOHN BURKE (LIMITED), Appellant,
v.
DAVID H. BLAIR, COMMISSIONER OF INTERNAL REVENUE, et al.
No. 245.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR THE APPELLEES.

STATUS.

This suit, one of several brought to test the constitutionality of the Willis-Campbell Act (Chap. 134, 42 Stat. 222), was filed in the District Court for the Southern District of New York to enjoin the prohibition enforcement officers from interfering with the importation, sale, and distribution for medicinal purposes of an intoxicating liquor known as Guinness's Stout, upon the ground that said Act, and the regulations made pursuant thereto, are unconstitutional and void, in so far as they prohibit the importation, sale, purchase, and use of said stout for medicinal purposes.

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The case came before Judge Knox on appellant's motion for a preliminary injunction and appellees' motion to dismiss. The motion for a preliminary injunction was denied and the motion to dismiss granted in a memorandum opinion based upon the ruling of Judge Garvin in *Piel Brothers* v. *Day*, 278 Fed. 223, affirmed in 281 Fed. 1022. (R. 9–10.) The case is here on direct appeal.

STATEMENT.

Appellant Edward and John Burke (Limited), a subsidiary of an English corporation located at Dublin, Ireland, is a New York corporation and has its principal place of business in New York City. For many years prior to the enactment of the Willis-Campbell Act appellant and its predecessor, as a branch of the English corporation, were extensively engaged in the importation, sale, and distribution throughout the United States to wholesale druggists, grocers, and others of Guinness's Stout for medicinal and beverage purposes. Upon the passage of said Act, in 1921, the prohibition officers refused to issue to appellant a permit to sell, and to pharmacists and physicians, respectively, permits to purchase and prescribe, said stout for medicinal purposes.

Alleging that such refusal will result in the destruction of a valuable property right and that the Willis-Campbell Act, in so far as it prohibits the prescribing of appellant's stout for medicinal purposes, is unconstitutional and void, because an unauthorized and unlawful attempt by Congress to

legislate over a subject matter reserved to the States by the Tenth Amendment, and because said Act deprives it of its property without due process of law and takes its property for public use without just compensation in violation of the Fifth Amendment, appellant brought this suit to enjoin the appellees from enforcing the provisions of the Act by declining to issue permits to appellant, pharmacists, and physicians, respectively, for the sale, purchase, and prescription of appellant's product for medicinal purposes. The bill was dismissed, as above stated.

THE ISSUES.

Appellant's main contention is that while the Eighteenth Amendment has given Congress power to prohibit the manufacture, sale, and transportation of intoxicating liquor for beverage purposes, the power to permit, regulate, or prohibit the use of intoxicating liquor for nonbeverage purposes has been reserved to the States by the Tenth Amendment; that while Congress possesses the incidental power to impose regulations upon the manufacture, sale, and transportation of nonbeverage liquor so far as is reasonably necessary to make effective its control over beverage liquor, such power is limited to reasonable regulation and must stop short of the complete prohibition of the use of malt liquor for medicinal purposes, sought to be effected by the Willis-Campbell Act.

It is also contended that the Act violates the Fifth Amendment, because (*a*) the prohibition of the sale

and use of appellant's stout for medicinal purposes, while permitting the sale of all spirituous and vinous liquor for such purposes, although containing a larger alcoholic content and much more likely to be used for beverage purposes, is so arbitrary and unreasonable as to amount to an unjust discrimination and a taking of appellant's property without due process of law; and (*b*) the immediate prohibition upon the passage of the Act of the further sale of Guinness's Stout, without giving appellant an opportunity to dispose of its stock on hand, took its property for public use without just compensation.

It appears from appellant's bill (R. 3) that Guinness's Stout consists of pale malt, hops, and a certain amount of roast malt or barley, with the addition of water, and that its alcoholic content, by volume, is from 7 to 8 per cent. It is therefore an intoxicating malt liquor and, like the beer and other malt liquors involved in the Everard's Breweries case, presented and argued with this case, comes specifically within the provisions of the Willis-Campbell Act that only spirituous and vinous liquor may be prescribed for medicinal purposes. The Government's brief in that case will serve as a reply to many questions here presented, and this brief will be confined to additional points raised here but not presented in that case.

ARGUMENT.

I.

The bill.

Appellant alleges that its product was used largely for medicinal purposes, but it also appears that some was used for beverage purposes. It is further alleged that 50 per cent of its sales were made directly to wholesale druggists and grocers. The proportion to each is not given, but it is fair to assume that at least a part of the product sold to grocers was used for beverage purposes. The fact that a part was used for nonbeverage purposes did not preclude Congress from legislating with respect to the part used for beverage purposes. It was because of such instances, where intoxicating liquors manufactured and sold ostensibly for medicinal purposes were diverted to beverage purposes, that Congress found it necessary, as had the States in the administration of their prohibition laws, to place a total prohibition upon the use of all malt liquors for medicinal purposes. It developed during the administration of the National Prohibition Act that the law was inadequate and did not accomplish its purpose, and that the constitutional mandate could not be effectively carried out unless the Act was amended so as to cure defects which arose in the course of its enforcement. Congress concluded that to permit the indiscriminate prescribing of malt liquors for medicinal purposes would render the prohibition law of little effect and

that a total prohibition of such prescriptions was necessary to efficient enforcement of the law.

The bill also alleges that of the 435 physicians who replied to questionnaires sent out in 1904, ninety-six stated that they did not prescribe stout as a medicine and 339, or 78 per cent, stated that in their judgment stout possessed valuable medicinal qualities. The inquiries were sent to physicians in New York and elsewhere. Because of the large number of physicians in that State, it may be assumed that the greater number of replies came from New York. Whatever may have been the sentiment on prohibition in that State in 1904, the State law on the subject has recently been repealed. The sentiment on prohibition in a State is reflected in the number of physicians' prescriptions for medicinal liquor. There are approximately 16,500 physicians in the State of New York. The reports to the Prohibition Unit show that approximately 54 per cent of these hold permits to prescribe liquors, while in a number of other States no physicians hold permits to prescribe liquors, and in most of the remaining States the number of permit-holding physicians is small. Conceding that 339, or 78 per cent. of the physicians replied that in their judgment stout possessed medicinal properties, this number, especially when including replies from a State where the percentage of permit-holding physicians is high, is negligible when compared with the evidence before Congress that 82 per cent of the 152,627 physicians of the country prescribe no liquors whatever; that in 24 States no physicians hold permits to prescribe

liquors of any kind, and that only 22 per cent of the physicians of the United States prescribe liquors for medicinal purposes. This evidence came from all the States. Congress legislated for the entire country, in obedience to a popular demand, and not with regard to any particular State or any particular malt liquor.

Moreover, advancing medical science precludes the assumption that the opinions expressed in 1904 necessarily reflected the sentiment of the medical profession on the subject seventeen years later, when Congress concluded, after a thorough investigation, on evidence presented by the most eminent and reputable medical authorities of the country, that malt liquors were not a legitimate medicinal agent. In this connection, it should be noted that only one physician appeared before the committee in advocacy of malt liquors as a medicine. His attitude was promptly repudiated by the Medical Society of the State of New York.

So it can not be said, as appellant contends, that the case is one where it stands admitted that stout is a valuable therapeutic agent and that its predominant use is for medicinal purposes.

II.

Power of Congress under the Tenth Amendment.

Appellant contends that the grant of power contained in the Eighteenth Amendment is limited by the reservations of the Tenth Amendment; that by

the express language of the Eighteenth Amendment the control over intoxicating liquors conferred on Congress is limited to beverage purposes; that the necessary effect of the Tenth Amendment is to reserve to the several States all power over intoxicating liquor for nonbeverage purposes; that this power is exclusive and the States alone may exercise it, and that Congress is without any legislative power to determine what liquors shall be sold and used for medicinal purposes.

Congress, however, has been given express power to enact legislation to prohibit the use of intoxicating liquor for beverage purposes, and this power carries with it the incidental power to enact such laws and make such regulations as will effectively prevent the manufacture, sale, or transportation of intoxicating liquor for the prohibited purposes.

McCulloch v. *Maryland*, 4 Wheat. 315.
Purity Extract Co. v. *Lynch*, 266 U. S. 192.
Hoke v. *United States*, 227 U. S. 308.
Ruppert v. *Caffey*, 251 U. S. 264.

But appellant earnestly contends that this incidental power can not be exercised so as wholly to prohibit the sale of intoxicating liquor for nonbeverage purposes; that while Congress may, by regulations, permits, limitations on prescriptions, and otherwise, throw safeguards around the sale of liquors for nonbeverage purposes so as to prevent their sale for beverage purposes, it may not, as is attempted in the present Act, wholly usurp the legis-

lative function of the States and altogether prohibit the sale of intoxicating liquors for nonbeverage purposes; that reasonable regulation, under the Tenth Amendment, must stop short of absolute prohibition.

(a) Argument based on erroneous assumption.

It first should be observed that appellant's contentions are premised on the erroneous assumption that malt liquors possess valuable medicinal properties. Congress determined that malt liquors have no therapeutic value and are no remedy of any sort for any kind of disease whatever; that they serve no medicinal purpose which can not satisfactorily be met in other ways; that if alcohol be needed it may be prescribed, and that if malt be sometimes of use it may be prescribed, or the two may be combined in a prescription so as to secure their utility. It was shown that an intoxicating beverage, such as appellant's stout, was not an indispensable medium for the administration of either alcohol or malt. The evidence before Congress on the subject was so overwhelming that it can not be said that its conclusion was arbitrary or unreasonable.

(b) Safeguards suggested by appellant found inadequate.

The safeguards suggested by appellant have been tried and found inadequate. The evidence submitted to Congress was that under the provisions of the National Prohibition Act, and the regulations made pursuant thereto, the enforcement of the prohibition

Amendment was constantly fettered by various subterfuges and frauds. Prescriptions were issued under the guise of medical prescriptions, but intended for the procurement of liquor for beverage purposes. Liquors manufactured and sold ostensibly for medicinal purposes were diverted to beverage purposes. In fact, the entire scheme of prohibition for beverage purposes as embodied in the Amendment and the National Prohibition Act would have been defeated had not Congress concluded to put an end to the abuse, so far as possible, by prohibiting all traffic in malt liquors.

(c) Congress not restricted to regulation if absolute prohibition necessary.

It next is contended that the action of Congress amounted to absolute prohibition and not mere regulation. Of course, if Congress was justified in its conclusion that malt liquors have no medicinal qualities, then it imposed no prohibition on *medicinal* liquors and therefore prohibited nothing reserved to the States.

When Congress possesses the power to prohibit a recognized evil, like the liquor traffic, that power carries with it the inherent power to make such prohibition effective. Congress had power to prohibit the use of intoxicating liquors for beverage purposes and it had the authority to deal with the subject to the extent necessary to make the prohibition effective. To hold otherwise would be to concede that Congress had the power to prohibit,

but did not have the authority to make that power effective.

Appellant concedes that Congress may establish reasonable regulations relating to the prescribing of intoxicating liquor under the power conferred by the Eighteenth Amendment to prohibit the beverage purpose. Every form of regulation implies a partial prohibition. The power to regulate includes the power to prohibit. Regulation means the prohibition of something and the extent of the prohibition is a matter for the determination of Congress, provided only that it stays within the limits of constitutional power. In determining whether legislation may under some circumstances properly take the form or have the effect of prohibition, the nature of the evil sought to be suppressed must be taken into consideration. *Lottery Case*, 188 U. S. 321, 355, 359. It may be that Congress did go to the extreme extent of its power. If so, the exceptional nature of the subject treated was the justification for its action. It was competent for Congress to recognize the difficulties always besetting the administration of laws aimed at the prevention of traffic in intoxicants, the ease with which the law may be violated, and the difficulties of procuring evidence of such violation. The characteristics of intoxicating liquor are such that it lends itself peculiarly to evasions of the law. It is well known that the unrestrained traffic in liquor for alleged medicinal purposes results in great abuses and serves as a ready means of defeating the

constitutional prohibition against the use of same for beverage purposes. To use the language of Chief Justice White in *Clark Distilling Co.* v. *Western Md. Ry. Co.*, 242 U. S. 311, 332:

> The exceptional nature of the subject here regulated is the basis upon which the exceptional power exerted must rest and affords no ground for any fear that such power may be constitutionally extended to things which it may not, consistently with the guarantees of the Constitution, embrace.

Congress was not restricted to mere regulation, if the end sought could not be accomplished except by prohibition. To prevent the beverage use the States found it necessary to prohibit the medicinal use. The Eighteenth Amendment was designed to prevent the same evil and, it is submitted, vested Congress with the same legislative discretion. The power of a State in the enforcement of its prohibition liquor laws to prohibit, as an incident necessary to their enforcement, the manufacture and sale of liquors for medicinal purposes has been sustained by the highest courts of the States and by this court. This is not, as appellant contends, because the States controlled the entire field of beverage and non-beverage liquors, but the power has been exercised, as an incident to prevent beverage use, where State constitutions contained exceptions in favor of medicinal use. *State* v. *Durein*, 70 Kans. 1, 17, affirmed 208 U. S. 613; *State* v. *Macek*, 104 Kans. 742; *State* v. *Kane*, 15 R. I. 395. Prior to national pro-

hibition, when legislating upon the subject of intoxicating liquors as an incident of some other constitutional power, Congress had authority to prohibit the use of such liquors for medicinal purposes, if in its legislative judgment and discretion such prohibition was necessary to make effective the constitutional power. In *Ruppert* v. *Caffey*, 251 U. S. 264, this court held that when the United States exercises any of the powers conferred upon it by the Constitution, no valid objection can be based upon the fact that such exercise may be attended by the same incidents which attend the exercise by a State of its police power. Surely, the power of Congress is no less under the express constitutional grant.

As showing the attitude of Congress where it had power to legislate on the subject prior to national prohibition, its legislation prohibiting the introduction of liquors into the Indian country contained no exceptions providing for medicinal use. The Alaska prohibition law permits alcohol only for medicinal use.

While there is a constitutional division, as appellant contends, of power over intoxicating liquors between National and state governments, there is no division of power, except for the concurrent power referred to in the Amendment, with respect to beverage liquors, and Congress has full power to legislate with respect to the latter.

The cases relied on by appellant are not in point. They deal with mining and manufacture and the em-

ployment of child labor therein, the conduct of boards of trade, labor unions, intrastate commerce, taxes on exports from States, and other matters within the exclusive police powers of the States reserved to them under the Tenth Amendment. They present no questions of abuses of or obstructions to powers expressly or impliedly conferred on Congress by the Constitution.

(d) Power of Congress to legislatively determine therapeutic value of malt liquors.

It is insisted that the question of whether or not stout has value as a medicine is a question of fact, subject to judicial determination, and that no declaration which Congress may make on the subject is conclusive upon the courts.

It is submitted, however, that this declaration constitutes necessary and practical legislation for the enforcement of the Eighteenth Amendment. It involves the very life of the Amendment; for if the question of whether or not a given intoxicant has therapeutic value be left to the conflicting views of courts and juries, it will be impossible uniformly to enforce the Amendment. If questions of fact be permitted to be introduced in each case so that courts and juries may decide the question upon the weight of the evidence, then the legal views upon the question will depend upon state lines or the boundaries of Federal districts. In one State or district the prescription of a given beverage will be permitted, because found valuable for medicinal purposes, and pro-

hibited in another State or district, because of a contrary view; and the decisions on the subject, especially where juries are concerned, are likely to depend upon or be affected by the sentiment on prohibition in the particular State or district. This would be reverting to conditions which it was the purpose of the Amendment and enforcement law to remedy and would tend to defeat the Amendment because of the opportunities, sure to follow, for diverting prescription liquors into beverage channels.

The contention has been answered, in effect, by this court's decision in *Ruppert* v. *Caffey, supra*. Before the Eighteenth Amendment, when power so to do was to be found, if at all, in the "appropriate legislation" clauses of the Constitution, or the constitutional war power provision, this court, in the above case, upheld the war-time prohibition definition of intoxicating liquor as being any liquid which contained more than one-half of one per cent of alcohol. It was held, in effect, that Congress, in the light of what experience had demonstrated to the States to be necessary in enforcing prohibition, could declare a fact to exist and, so declaring, could preclude the courts themselves from any judicial examination and finding upon such fact. If Congress could, without the aid of the Eighteenth Amendment, legislatively determine that a malt liquor which contained more than one-half of one per cent of alcohol is *per se* intoxicating, so that the courts are absolutely precluded by this legislative determination, then with the aiding provisions of the

Eighteenth Amendment it can, on the same principle, legislatively determine whether a given intoxicant is or is not a valuable therapeutic agent and preclude the courts from judicially examining and determining that fact for themselves.

The sole question is whether the legislation can be said to be reasonably necessary to enforce the prohibitions of section 1 of the Amendment and adapted to carry out the "appropriate legislation" provision of section 2 thereof. This is the extent of judicial inquiry. If it was, the legislative determination of the controverted question of the therapeutic value of malt liquors will not be reviewed by the courts nor the question determined for themselves.

> The inquiry must be whether, considering the end in view, the statute passes the bounds of reason and assumes the character of a merely arbitrary fiat. *Purity Extract Co.* v. *Lynch*, 226 U. S. 192, 204.

In *Rast* v. *Van Deman*, 240 U. S. 342, it was said (p. 357):

> It makes no difference that the facts may be disputed or their effect opposed by argument and opinion of serious strength. It is not within the competency of the courts to arbitrate in such contrariety.

See also—

> *Hebe* v. *Shaw*, 248 U. S. 297.
> *Price* v. *Illinois*, 238 U. S. 446.
> *Atlantic Coast Line* v. *Georgia*, 234 U. S. 280.
> *Armour & Co.* v. *North Dakota*, 240 U. S. 510.

In the last case it was said (p. 513):

> If a belief of evils is not arbitrary we can not measure their extent against the estimates of the legislature, and there is no impeachment of such estimate in differences of opinion, however strongly sustained. And by evils, it was said, there was not necessarily meant some definite injury but obstacles to a greater public welfare. Nor do the courts have to be sure of the precise reasons for the legislation or certainly know them or be convinced of the wisdom or adequacy of the laws.

The National Prohibition Act, to which the present Act is an amendment, provides that all the provisions of the Act shall be liberally construed. The evidence before the committee, the debates upon the measure, the figures showing the number of physicians who do not prescribe liquors, the provisions of the constitutions of the States having prohibition prior to the adoption of the Eighteenth Amendment, are strongly indicative that the overwhelming weight of sentiment among the members of the medical profession is that malt liquors are not a necessary therapeutic agent. Giving the utmost consideration to the opinions of the physicians referred to in appellant's bill, and to others who regard malt liquor as necessary for medicinal use, the b st that can be said is that the matter is debatable. This court repeatedly has held that when the evidence showed the subject of legislation enacted in pursuance of a constitutional power to be debatable, the court will

not interfere with the judgment of the legislative body. *Price* v. *Illinois, supra,* involved the pure food statute of Illinois which prohibited preservatives containing boric acid. Plaintiff contended that boric acid was not injurious to health and offered to submit proof to that effect, but the offer was rejected. In affirming the decision, this court said (pp. 452–453):

> The contention of the plaintiff in error could be granted only if it appeared that by a consensus of opinion the preservative was unquestionably harmless with respect to its contemplated uses; that is, that it indubitably must be classed as a wholesome article of commerce so innocuous in its designed use and so unrelated in any way to any possible danger to the public health that the enactment must be considered as a merely arbitrary interference with the property and liberty of the citizen. It is plainly not enough that the subject should be regarded as debatable. If it be debatable, the legislature is entitled to its own judgment, and that judgment is not to be superseded by the verdict of a jury upon the issue which the legislature had decided. * * * The present case is one * * * where the statute * * * specially prohibits preservatives containing boric acid. The legislature thus expressed its judgment and it is sufficient to say, without passing upon the opinions of others adduced in argument, that the action of the legislature can not be considered to be arbitrary. Its judgment appears to have sufficient support to be taken out of that category.

In *Hebe Company* v. *Shaw*, *supra*, it is said (p. 303):

> If the character or effect of the article as intended to be used "be debatable, the legislature is entitled to its own judgment, and that judgment is not to be superseded by the verdict of a jury," or, we may add, by the personal opinions of judges, upon the issue which the legislature has decided.

(e) Internal affairs of States only incidentally and indirectly affected.

Complaint is made that the Act usurps the legislative function of the States. But there is no attempt to usurp the legislative functions of the States, regulate their internal affairs, or interfere with anything reserved to them by the Tenth Amendment further than is reasonably necessary. There is no attempt unduly to restrict the calling of physicians or druggists, or to invade the domain of the medical profession. Internal regulation is interfered with, if at all, only to the extent of maintaining efficient regulation of beverage liquors under the paramount power of Congress. The purpose of the Act is to suppress the beverage use, not to supervise medicinal use within the States. It does not contemplate any general prohibition of medicinal liquors, but confines itself to prohibition for beverage purpose. In order effectively to accomplish this purpose Congress found it necessary indirectly to encroach upon state authority, but if the Act be otherwise within the powers specifically conferred upon Congress it is not invalidated because of the

indirect and incidental effect it may have upon state powers.

Southern Ry. Co. v. *United States*, 222 U. S. 20.
Minnesota Rate Cases, 230 U. S. 352.
United States v. *Doremus*, 249 U. S. 86.
Wisconsin R. R. Com. v. *C. B. & Q. R. R. Co.*, 257 U. S. 563.

(f) Conflicting state laws subordinate to paramount law of Congress.

It is also urged that the laws of the State of New York, where appellant's place of business is located, permit the sale of stout for medicinal purposes; that these laws are valid and are the measure of appellant's rights.

Congress, acting pursuant to constitutional authority, vested by the Eighteenth Amendment, has assumed control of the beverage liquor field. Any enactment by it, if within the specific powers conferred, becomes the supreme law of the land, and the acts of a State, whether exercised under its police power or otherwise, which are in conflict therewith, must be subservient to it.

Leisy v. *Hardin*, 135 U. S. 100.
Flaherty v. *Hanson*, 215 U. S. 515.
Eubank v. *Richmond*, 226 U. S. 137.
Jacobson v. *Massachusetts*, 197 U. S. 11.

In the last case it was said (p. 25):

> A local enactment or regulation, even if based on the acknowledged police powers of a State, must always yield in case of conflict

> with the exercise by the general government of any power it possesses under the Constitution.

And in *Flaherty* v. *Hanson, supra* (p. 525):

> A State may not so exercise its police powers as to directly hamper or destroy a lawful authority of the Government of the United States.

III.

The Act not invalidated by the Fifth Amendment.

It is contended that the legislation is invalidated by the Fifth Amendment, first, because the Act in prohibiting the use of Guinness's Stout for medicinal purposes, while permitting the use for such purposes of spirituous and vinous liquors, is arbitrary, capricious, and unreasonable; and, secondly, because the Volstead Act, which permitted the use of stout for medicinal purposes, was declarative of a national policy to that effect and amounted to an assurance to appellant that its stock then on hand could thereafter lawfully be disposed of for those purposes, whereas the Willis-Campbell Act, subsequently passed, immediately prohibited the further use of said stout and thereby took appellant's property for public use without just compensation.

A.

The contention that the Act constitutes an unjust discrimination against appellant because it prohibits absolutely the prescribing of Guinness's Stout and

other malt liquors, while permitting the prescribing of spirituous and vinous liquors, can not be maintained.

Congress was empowered to prohibit the use of intoxicating liquors for beverage purposes, and it could fix the conditions necessary to make that power effective. The details of such legislation rested with Congress, and the courts can not interfere unless fundamental rights guaranteed by the Constitution were violated. The extent of the prohibition and the subjects to which it should be applied, were matters within its legislative discretion and were not, as appellant contends, reserved to the States.

The need for such legislation was clearly set forth, and Congress deemed the legislation imperative to accomplish the effective enforcement of the Amendment and prohibition law. The Act should be so construed as to give effect to its manifest purpose and intent. It was represented that if malt liquors were permitted as a medicine it would be impossible to enforce prohibition. From the large number of breweries which had filed applications for permits to manufacture malt liquors it was apparent that their product would be forced into illegitimate channels. A majority of the States had prohibited the prescription of malt liquors for medical purposes and in others the quantity of intoxicating liquor which might be prescribed was so small as to indicate that it was not intended that malt liquors should be prescribed for such purposes. These considerations,

and the determination that malt liquors possess no therapeutic value, afford adequate basis for the prohibition and it can not be said that the classification was so arbitrary and unreasonable as to constitute an unjust discrimination against appellant and other distributors of malt liquors. The prohibition of malt liquors as a medicine has a real and substantial relation to the prohibition of such liquors as a beverage.

Whether, as appellant contends, the prohibition should have been applied to spirituous and vinous liquors, because they contain a larger alcoholic content and offer greater facility for illegal use, rather than to malt liquors, was a matter for Congress to determine and will not be reviewed by this court. That the prohibition was not also extended to spirituous and vinous liquors, even if Congress had power so to do, is immaterial and does not affect the prohibition placed on malt liquors, if there was substantial basis for the selection made in the exercise of the legislative discretion.

Moreover, appellant can not complain of any unjust discrimination, because it has no inherent right to sell and distribute malt liquors.

Mugler v. *Kansas*, 123 U. S. 623.
Crane v. *Campbell*, 245 U. S. 304.

B.

Finally, it is claimed that as no provision was made for compensating appellant for the loss which it would sustain from the enforcement of the Act, and

as the effective date of the Act was not postponed for a period so that appellant might dispose of its stock, its property was taken for public use without just compensation.

This claim has been disposed of contrary to appellant's contention by this court's decisions in the following cases:

Mugler v. *Kansas*, 123 U. S. 623, 637.
Hamilton v. *Kentucky Distilleries Co.*, 251 U. S. 146.
Ruppert v. *Caffey*, 251 U. S. 264.

CONCLUSION.

It is respectfully submitted that the Willis-Campbell Act is a valid exercise of the power conferred upon Congress by the Eighteenth Amendment; that appellant was deprived of no constitutional rights, and that the action of the District Court in dismissing appellant's bill should be affirmed.

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JANUARY, 1924.

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